

NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PAUL K. SMITH,

Plaintiff,

v.

CIVIL NO. 1995/28

TRANSDUCER TECHNOLOGY, INC.
ENDEVCO CORPORATION and
MEGGITT-USA, INC.

Defendants

TO: Lee J. Rohn, Esq.
George H. Logan, Esq.

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION (ORDER DATED 5/19/00)

THIS MATTER came for consideration on Plaintiff's Motion for Reconsideration of the Order dated May 19, 2000. Defendants filed opposition to the motion. Plaintiff did not reply to such opposition.

The May 19, 2000 Order concerned the failure of Defendants' expert witness to bring documents to his deposition. The documents were requested by Plaintiff's First Amended Notice of Expert Deposition [Fed. R. Civ. P. 30(b)(5)]. In the Order, the Court held that such Notice of Deposition did not compel production of documents without an accompanying subpoena *duces tecum* in accordance with Rule 45(a)(1)(c).

Plaintiff's Motion for Reconsideration misconstrues the May 19, 2000 Order. Plaintiff states:

The essence of this Court's holding in its Order...is that *Marsh*¹ requires that documents 'considered' by an expert in forming his opinion must be obtained by use of subpoena *duces tecum* in conjunction with the expert's deposition...(emphasis added).

Plaintiff suggests that such order forecloses other avenues of discovery that are mandated or allowable under the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 26(a)(2)(B) provides for required disclosure of expert witness reports and what must be contained therein. Rule 26(b)(4)(A) provides for taking depositions of an opponent's expert witness and that the deposition shall not be conducted until the expert's report is provided. LRCi 26.3(a) provides that the opposing party is entitled to the expert's report at least thirty (30) days before the expert deposition.

If a party wishes to depose an opponent's expert and considers the expert's report to be deficient, the party may file a motion to compel as provided in Fed. R. Civ. P. 37(a)(2):

If party fails to make a disclosure required by Rule 26(a) any other party may move to compel disclosure and for appropriate sanctions.

A Rule 30(b)(5) Notice of Deposition to a non-party deponent will not compel such production.

¹. *Marsh v. Jackson*, 141 F.R.D. 431 (W.D. Va. 1992).

The cases cited by Plaintiff in his motion do not hold otherwise. *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 638 (N.D. Ind. 1996) notes that the expert witness disclosure is mandatory; *Hasbro Inc. v. Serafino*, 168 F.R.D. 99, concerned a deposition subpoena served on a **plaintiff** pursuant to Fed. R. Civ. P. 45 rather than seeking such documents pursuant to Rule 34; *Hartford Fire Insurance Co. v. Pure Air on the Lake Limited Partnership*, 154 F.R.D. 202 related to a subpoena served on a **consulting expert not expected to testify** and that the Rule 45 subpoena is subject to the limitations of Rule 26(b)(4)(B) [need to show exceptional circumstances for such discovery].

Alper v. U.S.A., 190 F.R.D. 281 (D. Mass. 2000) does contain language contrary to *Marsh* as cited by the court in the May 19, 2000 Order. In *Alper* the court quashed plaintiff's subpoena to produce documents issued to defendant's expert witness, as being beyond the discovery schedule. The court then stated that although Dr. Becker (the expert witness):

[h]imself is not a party to the action, Rule 34 'governs the discovery of documents in the possession or control of the parties themselves.' Given fact that Dr. Becker is Defendant's expert, the documents which Plaintiff seeks from him may be considered to be within defendant's control. Hence Rule 34, not Rule 45 would appear to apply.² *Id* at 283.

². In any event, a motion pursuant to Rule 34 is not equivalent to the Rule 30(b)(5) Notice of Deposition utilized by

Alper cites no precedent for such proposition and later equivocates:

[E]ven were the court to assume that Rule 45 applies to Becker... *Id.*

Alper has likewise has not been cited by other cases during its brief term in print whereas *Marsh* has been so acknowledged. See e.g. *Perry v. U.S.A.* 1997 WL 53136 *1 (N.D. Tex.); *Ambrose v. Southworth Products Corp.*, 1997 WL 470359 *1 (W.D. Va.); [noting that Rule 26(b)(4) does not permit the use of a bare subpoena *duces tecum*]; *Greer v. Anglemeyer D.O.*, 1996 WL 56557 *2 (N.D. Ind.); *Hartford Fire Ins. Co. v. Pure Air on the Lake, Ltd.*, 154 F.R.D. 202, 208 (N.D. Ind. 1993); *Quale v. Carol Cable Co., Inc.*, 1992 WL 277981 *2 (E.D. Pa.) [A Rule 45 subpoena with respect to experts expected to testify at trial is **limited by Rule 26**).

Plaintiff has provided no convincing argument for reconsideration of the May 19, 2000 Order. The Court reiterates that a Notice of Deposition to the opposing party is not a proper vehicle to compel production of documents from an expert witness at such expert's deposition. A Rule 45 subpoena *duces tecum* in conjunction with a properly noticed deposition may do so (subject however to any Rule 26 limitations). Nothing contained in the Order dated May 19, 2000 prohibits Plaintiff from utilizing other

Plaintiff in the case at issue.

Smith v. Transducer et al.
Civil No. 1995/28
Page 5 of 5 dated July 3, 2000

means of discovery [e.g. a motion to compel pursuant to Rule 37(a)(2)] to procure producable documents.

Accordingly, it is hereby;

ORDERED that Plaintiff's motion is DENIED.

ENTER:

Dated: July 3, 2000

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
ORINN ARNOLD
Clerk of Court

By: _____
Deputy Clerk